No. 33380

Supreme Court of Appeals of West Virginia

CHEMTALL, INCORPORATED, ET AL.,

Petitioners/Defendants-Below,

v.

THE HONORABLE JOHN T. MADDEN; AND ALL PLAINTIFFS IN *STERN, ET AL.* V. *CHEMTALL, INCORPORATED, ET AL.*, Civil Action No. 03-C-49M,

Respondents.

BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS/DEFENDANTS-BELOW

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 123 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC's members remain very concerned about the manner in which the Marshall County Circuit Court is allowing this case to proceed. This is the second *amicus* brief PLAC has filed in this case. The first brief concerned the propriety of certifying a massive multi-state class of plaintiffs. In this instance, PLAC's interest is in ensuring that the plaintiffs are not permitted to prosecute a punitive damages claim in a manner that would inevitably lead to excessive and perhaps duplicative punishment. Many product liability cases – so-called "mass torts" – involve aggregation of claims through class action certification or similar methods of consolidation. PLAC's members are defendants in many such mass tort cases, and they often face efforts to determine or assign punitive damages in the aggregate. PLAC has an interest in ensuring that such

efforts comport with constitutional norms and that defendants are protected against overreaching by aggressive class counsel. This *amicus curiae* brief is respectfully submitted to address the public importance of the issues presented apart from and beyond the immediate interests of the parties to this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The last time this case traveled to this Court, in 2004, the circuit court had certified an enormous class of plaintiffs who lived in seven different states and who alleged numerous methods of toxic exposure stemming from a laundry list of the defendants' allegedly culpable acts. This Court vacated the class certification order, holding that the circuit court had failed to conduct a thorough analysis of the proposed class in order to determine whether class treatment was truly appropriate.

That thorough analysis has still not taken place, and no class has yet been certified. Nevertheless, the circuit court has now approved a trial plan that calls for mass adjudication of a range of issues, *before the court ever takes up the question of class certification.* This trial plan is illegitimate for a number of reasons, as the petitioners' memorandum makes clear. Our concern as an interested *amicus*, however, is with one especially egregious aspect of the current trial plan: the manner in which the circuit court proposes to deal with the plaintiffs' request for punitive damages. By adjudicating the availability of punitive damages on a class-wide basis before ever determining whether the putative "class" truly merits common treatment, and by setting a class-wide punitive damages "multiplier" before there is any determination of the potential scope and scale of the compensatory damages, the circuit court's plan is both unfair and unconstitutional. If

approved by this Court and applied broadly throughout the State, this method of adjudicating punitive damages threatens to tip the scales quite dramatically and quite improperly in favor of plaintiffs.

The case management order and the way it deals with the determination of punitive damages violates the defendants' due process rights in three very important respects: First, the delayed class certification forces the defendants to defend against the possibility of punishment on a class-wide basis without any of the protections normally afforded by proper class treatment. The defendants face class-wide punishment if they lose without the possibility for class-wide exoneration if they win. Second, the trial plan all but guarantees that the defendants will be forced to pay punitive damages to individual plaintiffs whose claims of injury are unrelated to the conduct that may have justified punitive liability in the first place. Due process does not permit the imposition of punitive damages for conduct that is dissimilar to the conduct that harmed the plaintiff himself, nor does it allow punishment for harm allegedly inflicted on non-parties. Any punishment meted out under this trial plan will suffer from both of these constitutional defects. Third, the trial plan violates the long-established rule that punitive damages must be reasonably proportional to the harm caused by the defendants' culpable conduct. By calling for a determination of a punitive "multiplier" before any determination of liability or of the scope of the putative class, the trial plan risks creating an unconstitutionally excessive aggregate punitive award.

ARGUMENT

The case management order issued by the circuit court calls for the jury to determine punitive liability and a punitive damages "multiplier," applicable to *all* potential plaintiffs, *before* it is ever determined whether a proper class even exists – and if one does exists, which types of plaintiffs will be included in it. This procedure is unorthodox, unprecedented, and (especially in light of the U.S. Supreme Court's recent decision in *Philip Morris USA, Inc. v. Williams*, 127 S. Ct. 1057 (2007)) unconstitutional. It subjects the defendants to all of the risks of a multi-state class adjudication while affording them none of the safeguards; it creates a very real risk that any punishment imposed will be attributable to harm inflicted on non-parties and conduct dissimilar to that which allegedly harmed any plaintiff who eventually recovers damages; and it virtually ensures an excessive punitive award.

I. DETERMINING CLASS-WIDE PUNITIVE LIABILITY BEFORE CERTIFYING A CLASS OF PLAINTIFFS WOULD VIOLATE THE DEFENDANTS' DUE PROCESS RIGHTS.

In appropriate cases, the class action might be a useful tool for adjudicating mass torts and allowing courts and litigants to benefit from economies of scale. But mass adjudication presents serious risks of unfairness to the defendant, which is why the rules of civil procedure in West Virginia (and everywhere else) require putative class representatives to prove, for example, that their claims are typical of a group before being accorded representative status. See W. VA. R. CIV. P. 23(a)(3). This prerequisite protects against the possibility that defendants will be forced to defend against a "fictional composite" plaintiff whose claims might be "much stronger than any plaintiff's

individual action would be." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998).

A second important safeguard is built into the class action mechanism: While defendants face the risk of liability to an entire class of plaintiffs if they lose, they also stand to benefit from class-wide exoneration if they win. Under West Virginia's class action rules (and those of every other jurisdiction), a judgment binds every member of the certified class – whether the representative plaintiffs succeed or fail in proving liability. See W. VA. R. CIV. P. 23(c)(3). This critical feature of a class action – that absent parties are bound regardless of who prevails – protects defendants against the possibility of heads-I-win/tails-you-lose litigation. Without a mechanism for binding absent class members, a successful defendant is exonerated as to the class representatives *only*, and remains subject to suit for the same misconduct by any member of the putative class who was not a named plaintiff in the original action.

The current trial plan eviscerates this protection against successive class actions. Because the court plans to postpone class certification until after the first phase of the trial, the plaintiffs are in the enviable position of being able to decide whether to seek certification (and thus bind absent class members) *after* learning whether they stand to collect punitive damages. If plaintiffs *succeed* in Phase I and, for example, convince the jury to find punitive liability and set a high "multiplier," they will seek to certify as broad a class as they can manage and thus subject the defendants to large class-wide punishment. If plaintiffs *lose*, however, they can simply abandon the effort – leaving absent class members free to take another bite at the apple by bringing another lawsuit

alleging identical misconduct. The defendants in such a scenario would get no credit for having won the earlier case because the normal rules of *res judicata* would prevent them from using a judgment against anyone who was not a party to the original action. See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

This arrangement all but guarantees that sooner or later every corporate defendant will be held liable for class-based punishment, no matter how many times it has successfully fended off that cataclysmic outcome. Indeed, under the circuit court's approach, a defendant could successfully defend against allegations of class-wide treatment and prevail on the merits against individual plaintiffs in the first 99 cases, only to have all of its victories wiped out by a class-wide punitive exaction in the one-hundredth case.[1] As the California Supreme Court recently put it, forcing defendants to play this high-stakes game of Russian roulette "present[s] a problem of 'successive

[1] This is more than a mere hypothetical concern. To take just one example, consider the facts of *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). In that case, the U.S. Court of Appeals for the Seventh Circuit issued a writ of mandamus and directed a federal district court to decertify a class of hemophiliacs who had contracted HIV after receiving the defendants' blood solids. In the course of holding both that the standard for mandamus was satisfied and that the standards for class certification were not, the Seventh Circuit found it significant that the defendants had prevailed in twelve of the thirteen individual cases that had gone to trial. *Id.* at 1296, 1298. The court observed that if, notwithstanding their success rate in the individual cases, the defendants were to lose on liability in a class action, they could then "easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *Id.* at 1298. The same prospect would exist if this Court were to adopt the approach to class certification and punitive damages employed by the circuit court.

prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson v. Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005).

For these reasons, the one-way ratchet occasioned by the case management order would be terribly unfair to the defendants regardless of the type of damages the plaintiffs were seeking. But in this case – where the only item being conclusively determined in Phase I is punitive liability and a uniform class-wide punitive "multiplier" – the unconstitutionality of the circuit court's novel procedure is even more apparent. After all, it is well settled that a "decision to punish a tortfeasor by means of an exaction of exemplary damages" constitutes a "deprivation[] of *** property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434-35 (1994). Accordingly, basic principles of procedural due process require States to employ such safeguards as are "necessary to ensure that punitive damages are not imposed in an arbitrary manner." *Id.* at 420. Punitive damages, the U.S. Supreme Court has cautioned, "pose an acute danger of arbitrary deprivation of property" because "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding," even though "these awards serve the same purposes as criminal penalties." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Surely, due process cannot be satisfied by a procedure that allows a punitive exaction against a defendant who has been exonerated repeatedly (on what could have been a class-wide basis) for the same claimed misconduct.

What is more, this plan poses a serious risk that the defendants will be subject not simply to successive *attempts* to exact punishment, but also to multiple *actual*

punishments for the same misconduct. Despite this Court's earlier writ of prohibition, the named plaintiffs still claim to represent a very broad class of injured parties. The potential class members include plaintiffs who live in two different states and who claim to have been injured in a variety of different ways, at different times, and in different places. The defendants continue to believe – and have asserted in the circuit court – that this putative class lacks the type of cohesion that is required for class treatment under the rules. It is therefore possible (indeed, likely) that when the circuit court eventually considers the matter, it will certify a class much narrower than the one urged by the plaintiffs. However, because issues of "liability" are being tried *before* this determination is made, the jury will presumably hear evidence of misconduct allegedly relevant to the claims of the whole, broad group of potential claimants – some of which will have no relevance to the claims of the class ultimately certified.

If the jury returns a finding of punitive liability based on evidence of broad misconduct, some of which is later made irrelevant by a narrow class certification, then the punitive damages awards eventually recovered by the remaining class members will serve to punish the defendants for conduct that harmed absent parties who do not belong to the class and therefore are free to sue again. Insofar as any of those plaintiffs succeed, the defendants will be punished repeatedly for causing exactly the same injuries to exactly the same people. Such an outcome is plainly unconstitutional. As the U.S. Supreme Court explained decades ago, an owner of property "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again *** in a suit brought by a claimant who is not bound by the first judgment."

Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 75 (1961). The problem presented by repeated claims for money damages for the same injuries is no different. See *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) (describing "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause").

II. THE TRIAL PLAN PRACTICALLY ENSURES THAT PUNISHMENT WILL BE IMPOSED FOR CONDUCT DISSIMILAR TO THAT WHICH HARMED THE PLAINTIFFS, AND FOR HARM TO NON-PARTIES.

The broad range of evidence to be presented during Phase I and the hodge-podge of legal theories that will be tried do more than raise the specter of multiple punishment. The circuit court's plan presents a grave risk that at least some of the punishment eventually imposed after class certification and individual liability trials will be for conduct that did not actually affect the parties collecting punitive damages.[2] Such an outcome violates due process, as the U.S. Supreme Court has recently and repeatedly held.

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[2] Of course, as the petitioners explain at p. 21 of their brief, the circuit court's creative trial plan also violates due process by allowing a determination of punitive damages prior to *any* determination of "liability" whatsoever. Indeed, during Phase I, the jury will not even be asked to *consider* all of the factors enumerated in *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999) for determination of medical monitoring liability. This defect is not addressed at length in this submission, but it is a serious one. If this Court condones the circuit court's unprecedented attempt to split up the *Bower* elements, plaintiffs in future cases will be granted the unfair ability to hand-tailor trials to their strong points, duck the weaknesses of their case, and still have punitive damages assessed before any determination of wrongdoing against the defendants. This practice is unconstitutional and dangerous, particularly in medical monitoring cases, where plaintiffs already enjoy the benefit of not having to prove injury.

A. Punitive Damages Will Be Awarded Based On Conduct Dissimilar To That Which Harmed At Least Some Plaintiffs.

The case management order calls for the jury to hear evidence relating to a long and varied list of liability theories. During Phase I, the circuit court has held, the jury will be asked to determine whether, for example, the defendants (a) failed to adequately test their products, (b) produced "unreasonably dangerous" products, (c) failed to warn of the inherent dangers of their products, (d) failed to provide protective devices for use with their products, (e) failed to provide instructions to foreseeable users of proper methods for handling their products, or (f) should be strictly liable for manufacturing products that were "not reasonably safe." After hearing evidence relating to this tremendous range of alternative theories of liability, the jury will be asked to determine whether any of the defendants "acted in such a manner as to justify punitive damages," and if so, to set a single, one-size-fits-every-plaintiff, punitive damages "multiplier."

This aspect of the trial plan is fundamentally inconsistent with due process. In *State Farm*, the U.S. Supreme Court held that punitive damages cannot be based on conduct that lacks a close "nexus" to the conduct that harmed the plaintiff. 538 U.S. at 422. The trial plan here *guarantees* that there will be no such nexus. It would throw into a blender decades of claimed misconduct, allegedly committed by over a dozen separate defendants at various stages of the manufacturing and delivery process, to produce a set-in-stone punitive-damages multiplier applicable to an as-yet-undetermined number of potential plaintiffs. Not one of these plaintiffs would have been affected by all (or presumably even most) of the claimed misconduct.

Nor, critically, does the trial plan provide any means of determining which plaintiffs were unaffected by *any* of the misconduct found to merit punishment. For example, the plaintiffs plan to present evidence that the defendants failed to provide instructions for proper handling of their products and that they failed to warn users of the dangers. The jury might well conclude that only the former warrants punitive liability. Nevertheless, both the finding of punitive liability and the multiplier would apply to *every* plaintiff, including those who the defendants could show had sufficient expertise that they did not *need* instructions. Alternatively, the jury might conclude that a conscious failure to warn alone justifies imposition of punitive liability. Yet the defendants would be required to pay punitive damages to every plaintiff who could prove increased risk of disease stemming from toxic exposure, including those plaintiffs who were aware of the dangers even without having been warned. In short, the plaintiffs' various allegations of misconduct may or may not be relevant to any particular plaintiff's claim. In either scenario, groups of plaintiffs could be awarded punitive damages for harm unrelated or dissimilar to the particular harm that they actually suffered.

That is clearly unconstitutional, as other courts examining similar proposals have determined in the wake of *State Farm*. See, e.g., *In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005) ("In certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages, the district court's Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms."). Due

process does not permit punitive damages for generic "bad conduct" disconnected from a plaintiff's harm, and "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *State Farm*, 538 U.S. at 423. Yet that would be the inevitable result under the circuit court's trial plan. The defendants face punitive liability to all plaintiffs who can prove causation and damages, even if particular plaintiffs cannot show that they were victims of the particular acts that gave rise to punitive damages.

B. Punitive Damages Will Be Awarded Based On Harm To Non-Parties.

Finally, as the petitioners argue in their memorandum to this Court, the trial plan's broad-brush approach to punitive liability and its one-size-fits-all punitive multiplier violate the prohibition, so recently expressed by the U.S. Supreme Court, against punishment for harm to non-parties. See *Philip Morris USA, Inc. v. Williams*, 127 S. Ct. 1057 (2007). The *Williams* Court held that a punitive award based even "in part" on a jury's "desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent)" is "a taking of 'property' from the defendant without due process." *Id.* at 1060. It is "constitutionally important," therefore, "for a court to provide assurance" that the jury will impose punishment only for acts that harmed the particular plaintiffs eligible to receive compensatory damages in a given suit. *Id.* at 1064.

This trial plan provides no protection at all against punishment being imposed for harms to non-parties; indeed, it virtually guarantees that the defendants will be punished

for non-party harm. The punitive "multiplier" will be applied uniformly for all plaintiffs who are able to prove exposure, even though many of them might not be able to prove that their exposure resulted from whichever of the multiple theories of punitive liability led the jury to authorize punitive damages in the first place. This is a constitutionally impermissible result.

In their memorandum to this Court (at p. 6), the plaintiffs argue that the trial plan protects against the risk of punishment for harm to non-parties because only parties who can prove their own individual entitlement to medical monitoring payments will actually receive punitive damages, and those punitive awards will be scaled to the individual plaintiffs' own specific recovery. That is no answer. The point is that the individual plaintiffs who recover medical monitoring payments – and therefore punitive damages as well – will never have to show that they themselves, even if they are entitled to monitoring payments, were injured by the conduct that was deemed punishable in phase I. Thus, the trial plan imposes a serious risk that individual punitive awards will actually be based on conduct that harmed other parties – not the parties collecting. This is exactly what *Williams* forbids.[3]

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[3] To be clear, it is the "risk" of awarding punitive damages for harm caused to non-parties that *Williams* warns against. See *Williams*, 127 S. Ct. at 1065 ("[S]tate courts cannot authorize procedures that create an unreasonable and unnecessary *risk* of any such confusion [about harm to non-parties] occurring. In particular, we believe that where the *risk of that misunderstanding* is a significant one *** a court, upon request, must protect against *that risk*.") (emphasis added). For that reason, it is no answer to our argument to suggest that this Court should defer consideration of the constitutionality of the trial plan until after it has determined that the risks of unconstitutionality have manifested. By that point, it may well be too late to undo the damage to the defendants' due process rights.

III. THE UNIFORM "MULTIPLIER" RISKS IMPOSITION OF UNCONSTITUTIONALLY EXCESSIVE PUNITIVE DAMAGES.

The case management order violates due process in yet another respect: By asking the jury to set a punitive damages "multiplier" before there is any determination of individual damages – or even of the scope and size of the plaintiff class – the trial plan assures that the jury will be unable to determine whether the aggregate amount of punitive damages will be reasonably proportionate to the total amount of damages awarded for medical monitoring expenses.

The U.S. Supreme Court and this Court have repeatedly recognized that punitive damages "must bear a 'reasonable relationship' to compensatory damages" in order to comply with due process. *BMW of N. Am. v. Gore*, 517 U.S. 559, 580 (1996); see also *State Farm*, 538 U.S. at 424-29; *In Re: Tobacco Litig. (Personal Injury Cases)*, 218 W. Va. 301, 309, 624 S.E.2d 738, 744 (2005). What "relationship" counts as "reasonable" – that is, what ratio of punitive to compensatory damages is the maximum allowable by due process – depends on a number of case-specific factors, including the reprehensibility of the defendants' conduct, and, most importantly for present purposes, the *amount of total compensatory damages* awarded to the plaintiffs. The trial plan in this case makes it impossible for the jury to assess the amount of total compensatory liability before determining the ratio of punitive to compensatory damages. This violates due process.

Punitive damages are imposed largely to deter the defendant and others from engaging in tortious conduct in the future. See, e.g., *State Farm*, 538 U.S. at 419 ("Punitive damages *** are aimed at deterrence and retribution."). But punitive damages

are not the only available deterrent. As many courts (including this one) have recognized, large compensatory awards serve a significant deterrent function on their own. Indeed, *all* payments made to plaintiffs – whether they are denominated as punitive, compensatory, or equitable damages – can act as a deterrent. See, e.g., *State Farm*, 538 U.S. at 419 ("[P]unitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence.") (emphasis added); *Memphis Cnty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("deterrence *** operates through the mechanism of damages that are compensatory.") (emphasis omitted); *Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 281, 445 S.E.2d 219, 222 (1994) (affirming vacatur of $150,000 punitive award in light of $500,000 compensatory damages).

For this reason, the U.S. Supreme Court has repeatedly emphasized that the maximum permissible ratio of punitive to compensatory damages varies case to case based in large part on the absolute size of the compensatory damages awarded or any other payments (such as medical monitoring payments, for example) that the defendants are forced to expend as a consequence of their tortious behavior. Where "a particularly egregious act has resulted in only a small amount of economic damages," a relatively high ratio may be permissible. *State Farm*, 538 U.S. at 425. On the other hand, "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

The trial plan in this case calls for the jury to assign a punitive damages "multiplier" – essentially, to fix the ratio of punitive to compensatory damages – without having any inkling of the eventual size of the medical monitoring fund.[4] It also means that every single class member will receive the same ratio of punitive damages – no matter what amount of compensatory damages he or she receives and no matter what the particular circumstances are of his or her injury or claim. That presents a serious risk that the jury will return an excessive award – one that violates due process by being larger than necessary to punish and deter. See, e.g., *State Farm*, 538 U.S. at 419-20 ("[A] more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and Utah courts should have gone no further."); *BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (approving standards that allow determination of "whether a particular award is greater than reasonably necessary to punish and deter").

We are aware that this Court held in *In Re: Tobacco Litigation* that *State Farm* does not "per se" preclude a trial plan "wherein the punitive damages multiplier would be determined prior to the assessment of compensatory damages for each plaintiff." 218 W.

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[4] We do not wish to suggest, of course, that punitive damages should *ever* be available in equitable actions such as those seeking medical monitoring expenses. As petitioners explain (at pp. 23-26 of their brief), punitive damages are generally limited to cases in which actual compensatory damages have been assessed. Our point here is merely that *if* punitive damages can *ever* be available in a case seeking equitable "damages," at the very least, the ratio must be determined after the total payout is known.

Va. at 303, 624 S.E.2d at 740. But whatever the correctness of that holding (and we respectfully suggest that the U.S. Supreme Court's recent decision in *Williams* might require this Court to re-examine it), this Court itself "emphasize[d]" that the holding in *Tobacco* was "strictly limited" to the "narrow question" presented: whether *State Farm* categorically precluded a bifurcated trial plan like the one proposed in that case. This Court held that bifurcated trials can be permissible under *State Farm*, but only when the trial court is able to "ensure that the plaintiffs' evidence is relevant, reasonably related to the acts on which liability is premised, and supports their claim for punitive damages." *Id.* at 305. It remains to be seen whether this standard can be met in the *Tobacco* case itself; it certainly cannot be met here. Plaintiffs in this action propose to introduce, during Phase I, a vast array of charges. No one plaintiff claims to have been injured by all of the allegedly tortious behavior charged in the complaint. And because class certification has been delayed until after Phase I is complete, it will be impossible for the circuit court to "ensure" that evidence presented for the purpose of determining punitive liability is at all "relevant" or "reasonably related" to the punitive damages claims of any plaintiffs.

CONCLUSION

This Court should grant the petition and issue a writ of prohibition and/or mandamus vacating the case management order.

Dated: Washington, D.C.
August 14, 2007

Respectfully submitted,

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APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
(AS OF 8/6/2007)

3M
A.O. SMITH CORPORATION
ALTEC INDUSTRIES
ALTRIA CORPORATE SERVICES, INC.
AMERICAN SUZUKI MOTOR CORPORATION
ANDERSEN CORPORATION
ANHEUSER-BUSCH COMPANIES
APPLETON PAPERS, INC.
ARAI HELMUT, LTD.
ASTEC INDUSTRIES
BASF CORPORATION
BAYER CORPORATION
BELL SPORTS
BERETTA U.S.A. CORP.
BIC CORPORATION
BIRO MANUFACTURING COMPANY, INC.
BLACK & DECKER (U.S.) INC.
BMW OF NORTH AMERICA, LLC
BOEING COMPANY
BOMBARDIER RECREATIONAL PRODUCTS
BP AMERICA INC.
BRIDGESTONE AMERICAS HOLDING, INC.
BRIGGS & STRATTON CORPORATION
BROWN-FORMAN CORPORATION
CARQUEST CORPORATION
CATERPILLAR INC.
CHEVRON CORPORATION
CONTINENTAL TIRE NORTH AMERICA, INC.
COOPER TIRE AND RUBBER COMPANY
COORS BREWING COMPANY
CROWN EQUIPMENT CORPORATION
DAIMLERCHRYSLER CORPORATION
THE DOW CHEMICAL COMPANY
E & J GALLO WINERY
E.I. DUPONT DE NEMOURS AND COMPANY
EATON CORPORATION
ELI LILLY AND COMPANY
EMERSON ELECTRIC CO.
ENGINEERED CONTROLS INTERNATIONAL, INC.
ESTEE LAUDER COMPANIES
EXXON MOBIL CORPORATION
FORD MOTOR COMPANY
FREIGHTLINER LLC
GENENTECH, INC.
GENERAL ELECTRIC COMPANY
GENERAL MOTORS CORPORATION
GLAXOSMITH KLINE
THE GOODYEAR TIRE & RUBBER COMPANY
GREAT DANE LIMITED PARTNERSHIP
HARLEY-DAVIDSON MOTOR COMPANY
THE HEIL COMPANY
HONDA NORTH AMERICA, INC.
HYUNDAI MOTOR AMERICA
ILLINOIS TOOL WORKS, INC.
INTERNATIONAL TRUCK AND ENGINE CORPORATION

ISUZU MOTORS AMERICA, INC.

JARDEN CORPORATION

JOHNSON & JOHNSON

JOHNSON CONTROLS, INC.

JOY GLOBAL INC., JOY MINING MACHINERY

KAWASAKI MOTORS CORP., U.S.A.

KIA MOTORS AMERICA, INC.

KOCH INDUSTRIES

KOLCRAFT ENTERPRISES, INC.

KOMATSU AMERICA CORP.

KRAFT FOODS NORTH AMERICA, INC.

LINCOLN ELECTRIC COMPANY

MAGNA INTERNATIONAL INC.

MAZDA (NORTH AMERICA), INC.

MEDTRONIC, INC.

MERCK & CO., INC.

MICHELIN NORTH AMERICA, INC.

MICROSOFT CORPORATION

MINE SAFETY APPLIANCES COMPANY

MITSUBISHI MOTORS NORTH AMERICA, INC.

NINTENDO OF AMERICA, INC.

NIRO INC.

NISSAN NORTH AMERICA, INC.

NOKIA INC.

NOVARTIS CONSUMER HEALTH, INC.

NOVARTIS PHARMACEUTICALS CORPORATION

OCCIDENTAL PETROLEUM CORPORATION

PACCAR INC.

PANASONIC

PFIZER INC.

PORSCHE CARS NORTH AMERICA, INC.

PPG INDUSTRIES, INC.

PURDUE PHARMA L.P.

PUTSCH GMBH & CO. KG

THE RAYMOND CORPORATION

RAYTHEON AIRCRAFT COMPANY

REMINGTON ARMS COMPANY, INC.

RHEEM MANUFACTURING

RJ REYNOLDS TOBACCO COMPANY

SANOFI-AVENTIS

SCHINDLER ELEVATOR CORPORATION

SCM GROUP USA INC.

SHELL OIL COMPANY

THE SHERWIN-WILLIAMS COMPANY

SMITH & NEPHEW, INC.

ST. JUDE MEDICAL, INC.

STURM, RUGER & COMPANY, INC.

SUBARU OF AMERICA, INC.

SYNTHES (U.S.A.)

TEREX CORPORATION

TEXTRON, INC.

TK HOLDINGS INC.

THE TORO COMPANY

TOSHIBA AMERICA INCORPORATED

TOYOTA MOTOR SALES, USA, INC.

TRW AUTOMOTIVE

UST (U.S. TOBACCO)

VERMEER MANUFACTURING COMPANY

THE VIKING CORPORATION

VOLKSWAGEN OF AMERICA, INC.

VOLVO CARS OF NORTH AMERICA, INC.

VULCAN MATERIALS COMPANY

WATTS WATER TECHNOLOGIES, INC.

WHIRLPOOL CORPORATION

WYETH

YAMAHA MOTOR CORPORATION, U.S.A.

YOKOHAMA TIRE CORPORATION

ZIMMER, INC.